

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Promoting Efficient Use of Spectrum Through)	WT Docket No. 00-230
Elimination of Barriers to the Development of)	
Secondary Markets)	
)	

SECOND ORDER ON RECONSIDERATION

Adopted: October 9, 2008

Released: October 17, 2008

By the Commission:

I. INTRODUCTION

1. In the *Secondary Markets Second Report and Order*, the Commission took additional steps to facilitate the development of secondary markets in spectrum usage rights involving Wireless Radio Services.¹ Among other things, the Commission established “immediate approval” (or “immediate processing”) procedures for qualifying spectrum leasing arrangements and qualifying license assignments and transfers of control.² The Commission determined, however, that transactions that raised specified potential public interest concerns, including certain transactions raising potential foreign ownership concerns associated with Section 310(b)(4) of the Communications Act,³ would not be included among the categories of transactions that may be processed using the immediate approval (or immediate processing) procedures and instead required additional individualized review under the Commission’s streamlined “general approval” (or “general notification”) procedures.⁴ T-Mobile USA, Inc. (“T-Mobile”), which is subject to Section 310(b)(4) requirements because of the indirect foreign ownership interests associated with its licenses, filed a petition seeking reconsideration or clarification of the

¹ Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004) (“*Secondary Markets Second Report and Order*”).

² See generally *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17506-07 ¶ 4, 17509-46 ¶¶ 10-84 (spectrum leasing arrangements), 17553-58 ¶¶ 100-111 (license assignments and transfers of control). For *de facto* transfer leasing arrangements and for license assignments and transfers of control, the Commission adopted “immediate approval” procedures. For spectrum manager leasing arrangements, where Commission approval is not required, the Commission adopted “immediate processing” procedures. *Id.* See also 47 C.F.R. §§ 1.948(j), 1.9020(e), 1.9030(e), 1.9035(e).

³ 47 U.S.C. § 310(b)(4).

⁴ *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17513-16 ¶¶ 19-23, 17526-27 ¶ 47, 17554-55 ¶¶ 101-103. *De facto* transfer leasing arrangements and license transfers/assignments not eligible for “immediate approval” procedures are subject to “general approval” procedures. Spectrum manager leasing arrangements that are not eligible for “immediate processing” procedures are subject to the “general notification” procedures.

Secondary Markets Second Report and Order.⁵ For the reasons set forth below, we affirm the *Secondary Markets Second Report and Order* and deny T-Mobile's petition for reconsideration.

II. SECOND ORDER ON RECONSIDERATION

2. In the *Secondary Markets Second Report and Order*, the Commission took several additional steps to promote the development of secondary markets in spectrum usage rights by building upon the framework established in the *Secondary Markets First Report and Order*, which had established streamlined processing procedures for spectrum leasing arrangements and license assignments and transfers of control for Wireless Radio Services involving "exclusive use" licenses.⁶ Among other things, the Commission determined that to the extent that certain categories of spectrum leasing arrangements and license assignments and transfers of control did not raise potential public interest concerns relating to eligibility and use, foreign ownership, designated entity/entrepreneur matters, or competition, such transactions could be processed pursuant to immediate approval (or immediate processing) procedures.⁷

3. As regards spectrum leasing and license assignment/transfer transactions that raised potential foreign ownership concerns, the Commission discussed in detail the policies it was adopting in the *Secondary Markets Second Report and Order*. Consistent with the existing policy relating to Section 310(b)(4),⁸ the Commission explained that to be eligible for processing pursuant to the immediate approval (or immediate processing) procedures a potential spectrum lessee or assignee/transferee must be able to certify either (1) that it does not have more than 25 percent indirect foreign ownership or (2) that it has previously obtained a declaratory ruling from the Commission that establishes that the proposed transaction falls within the scope of that declaratory ruling, including the type of service and geographic coverage area, and that there has been no change in foreign ownership in the meantime.⁹ The Commission explained further that if the scope of any prior declaratory ruling did not cover the proposed transaction, a supplemental ruling would need to be obtained before a spectrum lessee or assignee/transferee would qualify for the Commission's new immediate approval (or immediate processing) procedures.¹⁰

4. Recognizing that the approach it was adopting might undercut many of the efficiencies provided by the immediate approval (or immediate processing) procedures and might require entities to make multiple Section 310(b)(4) filings, the Commission also enunciated a policy of entertaining Section

⁵ Petition for Reconsideration or, in the Alternative, Clarification of T-Mobile USA, Inc. (filed January 27, 2005) ("T-Mobile Petition").

⁶ See generally Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) ("*Secondary Markets First Report and Order*").

⁷ *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17506-07 ¶ 4, 17509-46 ¶¶ 10-84, 17553-58 ¶¶ 100-111.

⁸ *Id.* at 17514 ¶ 21 n.54 (discussing the Commission's policies relating to its public interest analysis of indirect foreign ownership).

⁹ *Id.* at 17514-15 ¶¶ 21-22 (establishing policy for *de facto* transfer spectrum leasing arrangements), 17526-27 ¶ 47 (adopting same policy for spectrum manager leasing arrangements), 17554-56 ¶¶ 101-103 (adopting same policy for license assignments and transfers of control).

¹⁰ *Id.* at 17514-15 ¶ 21. The Commission provided an example of a spectrum lessee that had previously received a ruling that approved its acquisition of a specific group of common carrier microwave licenses, or that approved its acquisition of a controlling interest in a carrier that holds a specific group of common carrier microwave licenses. The Commission noted that such a ruling would not cover a future spectrum lease of PCS spectrum, and that in order for the spectrum lessee to be able to satisfy the certification requirement, it must first request and obtain from the Commission a supplemental ruling to cover the spectrum leasing arrangements involving PCS spectrum. *Id.*

310(b)(4)-related petitions that could enable T-Mobile, as well as other carriers with indirect foreign ownership interests, to avail themselves of speedier processing of spectrum leasing arrangements and license assignments and transfers of control.¹¹ To minimize the need to request multiple Section 310(b)(4) rulings and to eliminate unnecessary regulatory hurdles for carriers seeking maximum flexibility to expand their service offerings, the Commission indicated that it would entertain petitions for Section 310(b)(4) rulings that seek to cover future spectrum leasing and license assignment/transfer transactions for services and geographic coverage areas specified in the petitions.¹² The Commission also indicated that it would entertain petitions that seek to cover such proposed transactions either by the petitioning carrier or by wholly-owned subsidiaries of that carrier.¹³ These petitions for declaratory ruling would then be forwarded to the appropriate Executive Branch agencies and the application would be processed under our current streamlined procedures, consistent with the Commission's general practice.¹⁴

5. In requesting reconsideration or clarification of the *Secondary Markets Second Report and Order*, T-Mobile requests that the policy enunciated with regard to Section 310(b)(4) not be strictly construed. T-Mobile argues that such a policy could potentially require T-Mobile (or any other carrier with approved foreign ownership) to seek an additional ruling on foreign ownership – and thus be denied the benefits of immediate approval procedures – if it wanted to acquire spectrum rights in current or new services to fill in geographic gaps in its national coverage, license rights in microwave or other services that would be used to support or expand its existing business, or licenses in services in which T-Mobile does not currently hold licenses and wanted to provide new services that enhance its product offerings to its customer bases.¹⁵ Stating that this policy places it at a competitive disadvantage, T-Mobile proposes revising or clarifying the requirement to state that no prior declaratory ruling would be necessary so long as the foreign ownership of the ultimate controlling entity would remain unchanged and the licenses that are the subject of the proposed transaction would be utilized in the current business of the applicant and its affiliates, or used to augment or expand the existing business or to enhance the current offerings, regardless of whether those licenses were in the same service that was the subject of the prior declaratory ruling of the applicant or its affiliates.¹⁶ As for the geographic coverage area of the prior ruling, T-Mobile requests that the prior ruling suffice in all cases where a national carrier is supplementing its current business, and that new rulings be required only when the new transaction would result in a “fundamental increase in the scope of the operations of the applicant and its affiliates.”¹⁷ T-Mobile also advocates on reconsideration that there is no need for a new declaratory ruling in the event the particular entity involved in the subject transaction is, or will become, a wholly-owned direct or indirect subsidiary of the parent whose foreign ownership levels have already been cleared by the Commission (and any other

¹¹ *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17515 ¶ 22.

¹² *Id.* In order to discourage the filing of speculative petitions, which would impose undue administrative burdens on Commission resources, the Commission stated that it would entertain petitions for such “blanket” rulings only in conjunction with applications that would be covered by the requested ruling. *See id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ T-Mobile Petition at i, 2-11.

¹⁶ *Id.* at ii, 3-11.

¹⁷ *Id.* at 8. Under T-Mobile's proposal, if the geographic scope of the new licenses would expand the footprint of the applicant's existing business (even a substantial expansion), but not result in the carrier expanding from a limited regional service provider into a national provider, the prior ruling would be deemed to have sufficient scope to cover the new transaction. *See id.*

relevant Executive Branch agencies), even if the particular entity has not received its own declaratory ruling.¹⁸

6. We affirm the policy adopted in the *Secondary Markets Second Report and Order* and deny T-Mobile's request for reconsideration or additional clarification. In adopting secondary market policies, and in particular the immediate approval (or immediate processing) procedures that T-Mobile addresses in its petition, the Commission sought to balance the goal of promoting efficient secondary markets with various other public interest concerns, including those pertaining to the Commission's Section 310(b)(4) review policies and processes. We determine that, as explained in the *Secondary Markets Second Report and Order*, the Commission struck the appropriate balance between promoting secondary markets while at the same time continuing to ensure that the Commission and the Executive Branch have a meaningful opportunity to review applications and petitions for potential public interest harms to national security, law enforcement, public safety, security of critical infrastructure, foreign policy, and trade policy.¹⁹ The immediate approval (or immediate processing) procedures adopted in the *Secondary Markets Second Report and Order* rely upon certifications made by applicants as to their compliance with specified eligibility criteria. We find that the service and geographic coverage criteria T-Mobile proposes that we adopt in order to permit the use of immediate approval procedures are not sufficiently precise to allow us to rely upon an applicant's certification for purposes of our Section 310(b)(4) review. While we appreciate T-Mobile's interest in being able to avail itself of these procedures in the case of otherwise eligible spectrum leasing arrangements and license assignments and transfers of control, we note, as discussed above, that the Commission already has provided opportunities for carriers to file petitions to expand the scope of any existing declaratory rulings and to speed the processing of any proposed secondary markets transactions not currently covered by existing declaratory rulings.²⁰ Considering the public interest concerns relating to Section 310(b)(4) review, we affirm this approach for secondary market transactions.

7. Finally, we do not address the argument that our procedures for common carrier licensees under Section 310(b)(4) should accommodate expedited processing where the particular entity involved in a transaction is, or will become, a wholly-owned direct or indirect subsidiary of the parent "whose foreign ownership levels have already been cleared by the Commission (and any other relevant Executive Branch agencies)." It is not apparent from this record why we should adopt different procedures under Section 310(b)(4) for applications for new licenses as opposed to secondary market

¹⁸ *Id.* at 8-9. T-Mobile recommended a similar proposal in the comments it submitted in response to the Notice of Proposed Rulemaking portion of the *Secondary Markets First Report and Order*. The Commission considered but did not adopt that recommendation in the *Secondary Markets Second Report and Order*. *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17515-16 ¶ 22 n.55.

¹⁹ *Id.*

²⁰ *Id.* at 17515 ¶ 22. In 2006, T-Mobile petitioned the Commission to clarify that its prior foreign ownership rulings involving PCS spectrum also applied to T-Mobile's anticipated acquisition of new licenses in the then-upcoming auction of Advanced Wireless Services (AWS) spectrum, or in the alternative to issue a new declaratory ruling to permit T-Mobile to acquire AWS licenses. T-Mobile USA, Inc., Petition for Clarification or, in the Alternative, Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934, As Amended, and Request for Streamlined Processing ("T-Mobile AWS Petition"). The Commission (through its International Bureau, on delegated authority) and the Executive Branch reviewed the application and then determined to extend the previous rulings to cover the newly auctioned AWS licenses, conditioned on T-Mobile's compliance with certain agreements that it had previously entered into with the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) regarding foreign ownership and national security issues. International Authorizations Granted – Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests, *Public Notice*, DA No. 06-2441 (Nov. 30, 2006) at 2 (Date of Action for T-Mobile's Declaratory Ruling and Grant of Authority – 11/28/2006).

transactions involving spectrum leasing arrangements or license transfers/assignments.²¹ In any event, because our procedures for granting new common carrier wireless licenses are beyond the scope of this proceeding, we determine that the Commission's secondary markets proceeding is not the appropriate avenue for revising this aspect of our policies.²²

III. ORDERING CLAUSES

8. Pursuant to Sections 1, 4(i), 301, 303(r), and 310 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 301, 303(r), and 310, IT IS ORDERED THAT this Second Order on Reconsideration IS ADOPTED and that the Petition for Reconsideration or Clarification filed by T-Mobile USA, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²¹ We note, for instance, that T-Mobile's 2006 petition pertaining to new AWS licenses, discussed in note 20 *supra*, raised similar concerns to those raised regarding secondary market transactions in the instant proceeding. T-Mobile AWS Petition at 2-3 & n.5 (in which T-Mobile stated that it had filed a similar petition in the secondary markets proceeding, WT Docket No. 00-230).

²² See *Secondary Markets First Report and Order*, 19 FCC Rcd 17549-50 at ¶¶ 91-92 (the Commission stated that it did not intend for the secondary markets initiative to be used as a means to undermine general policies applicable to licensees or to revise rules of general applicability).